IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 199 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MS.JUSTICE H.N.DEVANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Appellant(s)

Versus

SAUMIL B. KINARIWALA - Opponent(s)

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Appearance :

MR MANISH R BHATT for Appellant(s) : 1,

MRS SWATI SOPARKAR for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 20/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. On 10-10-2005, the Court framed the following substantial question of law.

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in deleting the addition of Rs.1,43,768/- being 2.52 % of share income from the firm of M/s. Ramniklal Jivanlal Kinariwala &Co. which had been assigned to various bodies of individuals ?"

1. Heard Mr. M.R.Bhatt, the learned Senior Standing Counsel for the revenue. It is submitted that the controversy raised by the question stands concluded and answered by the Apex Court decision in case of Commissioner of Income Tax vs. Sunil J. Kinariwala, (2003) 259 ITR 10 and hence the question requires to be answered in favour of the appellant-revenue.

2. As against that Mr.T.P. Hemani, appearing on behalf of the respondent-assessee placed reliance on a decision of the Apex Court in the case of Commissioner of Wealth-Tax vs. Lov S. Kinariwala, (2003) 259 ITR 440 to submit that once genuineness of the assignee, namely body of individuals was not found to be sham or bogus, for the purposes of taxing the income, such an entity could not be treated as non-genuine. He therefore submitted that in light of the aforesaid decision in Wealth-tax proceedings the appeal requires to be decided in favour of the assessee. In this context he has placed on record, with the permission of the Court, Tribunal's consolidated order dated 13th December, 1996 in ITA Nos.561 to 573/Ahd/1990 and cognate matters to contend that Tribunal has recorded findings of fact that there is no tax evasion by virtue of the assignment in question, there is a genuine transaction and the

assignee is a genuine entity.

3. Having heard the learned counsel it is apparent that, in the circumstances of the present case, the genuineness of the assignee is not disputed by appellant-revenue. The only controversy that survives thereafter is whether the assignment results in conferring an overriding title in favour of the assignee to the exclusion of the assignor assessee.

4. The Apex Court in the case of Commissioner of Income Tax vs. Sunil J. Kinariwala (Supra) came to the conclusion that there is a clear distinction between a case where a partner of a firm assigns his share in favour of a third person and a case where a partner constitutes a sub-partnership with his share in the main partnership. After referring to provisions of Section 29 (1) of the Indian Partnership Act, 1932, the Apex Court further held that the assignee became entitled to receive the assigned share of the profits from the firm, not as a sub-partner, but as an assignee because no sub partnership had come into existence. There was no diversion of income by overriding title.

5. It is an accepted position between the parties that the deed of assignment is identical in all material particulars except for the change in the name, date and the percentage of the share to be assigned. In these circumstances, the ratio of the Apex Court decision applies with full vigour and the genuineness of the assignee, which is not in dispute, does not operate as a distinguishing feature. In fact, it is common ground between the parties that all along the assessee had been pressing into service the decision of this Court reported in (1995) 211 ITR 127, and the revenue was trying to distinguish the same. The assessee had at no point of time raised any contention to the effect that there is any distinction on facts recorded by this Court in its aforesaid decision and the facts of the present case.

6. In these circumstances, applying the ratio of the Apex Court decision in case of Commissioner of Income Tax vs.Sunil J. Kinariwala (Supra), the question is answered in the negative. It is held that the Tribunal was not justified in deleting the addition of

Rs.1,43,768/= being 2.52 % of share income from the firm of M/s. Ramniklal Jivanlal Kinariwala &Company which had been assigned to various bodies of individuals.

7. The appeal is accordingly allowed. There shall be no order as to costs.

(D.A.MEHTA,J.)

(HARSHA DEVANI, J.)

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